



Address of Pierre-Richard Prosper

U.S. Ambassador-at-Large for War Crimes Issues

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### **Introduction**

Mr. Foreign Minister, thank you for your kind words of introduction. It is a pleasure for me to be here in your country at the Peace Palace, a place with an historical role in developing and expounding the legal traditions we all cherish for the cause of international peace and justice. Professor Bassiouni, it is equally a pleasure to be here with you and many others in the audience who have taken part in leading the charge in establishing mechanisms for addressing man's inhumanity to man. You have borne the intellectual and practical brunt of confronting some of the most difficult and painful problems humankind has faced over the past decades of conflict and turmoil. I truly welcome this opportunity to be here to present to this group the views of the United States on working together to pursue accountability for war crimes, particularly at a time when the world is experiencing new challenges.

### **September 11, 2001**

It is clear that September 11<sup>th</sup> has changed the world and the way we look at transnational threats and crimes. The tragic events of September 11<sup>th</sup> have forced us all to re-examine our traditional notions of security, our understanding of our attackers, and our approaches to bringing the perpetrators to justice. Moreover, September 11, gave the people of the United States a firsthand introduction into the pain and societal trauma that has unfortunately become so frequent in locations across our globe.

For the first time in modern history, mass atrocities were committed against the United States, on American soil. September 11 truly represented a loss of American innocence. The crimes committed at the World Trade Center in New York, at the headquarters of our Department of Defense, and in Pennsylvania were of a magnitude that defied the imagination and shocked the conscience. These acts are unacceptable and will be punished. We are truly grateful for the many nations that have stood at our side in our common fight and pledged to use the full range of tools at their disposal.

The acts of September 11<sup>th</sup> remind us that there must be accountability and the rule of law. The fundamental truth is that the rule of law defends civilization by erecting a wall of reason and humanity against savagery and brutality. To that end, and in the interests of preserving civilization across the world, the United States is committed more than ever to bringing perpetrators of war crimes and violators of international humanitarian law to justice both abroad and at home. We remain committed to working within the global community to confront the challenges that would destroy us all. We pledge to use our available resources and influence to promote the cause of freedom and liberty for all people.

Our views and our approaches may differ from some of those held within this room, but our goals we hold in common. I want to share with you some of our perspectives on the establishment of credible, effective accountability mechanisms to bring violators of international humanitarian law to justice and help build a society that universally respects and upholds human rights.

### **The International Criminal Court**

As many of you know, the International Criminal Court has been a point of concern for the United States. This concern has not changed as a result of September 11th. While the United States has sought from the inception of the debate at the end of World War II a court that could be neutral, focused on the pursuit of efficient justice, and most of all immune from the poisonous taint of raw political power, the Bush Administration, as with the previous administration, opposes the Rome treaty. And despite the signature by President Clinton, we – like the previous administration – will not send it to the United States Senate for ratification.

We are steadfast in our concerns and committed to our beliefs that the United States cannot be part of a process that lacks the essential safeguards to avoid a politicization of the process. We also firmly believe that the ICC treaty is just that – a treaty. Therefore it does not and should not have jurisdiction over a non-party state absent United Nations Security Council action. The United States has a unique role in the world in helping to defend freedom and advance the cause of humanity. We will continue to meet our responsibility but not at the price of our national security.

### **Bush Administration Philosophical Framework**

This does not mean, however, that we are prepared to disregard the pursuit of accountability and justice on the world stage. To the contrary, we remain deeply committed. Our differences are purely philosophical. We begin our approach from the domestic side of the ledger. As I recently testified before the United States Senate Committee on the Judiciary: “the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible ... International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis as in Rwanda and Yugoslavia....”

It is “this administration’s policy ... to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times.” This does raise the question of whether the United States will continue to support the existing ad hoc international tribunals created under the authority of the Security Council. We will.

It also raises the question of whether we see a role for the United Nations in pursuing accountability. We do. The United States remains proud of its leadership in working multilaterally to form the two ad hoc tribunals. They have both provided groundbreaking legal decisions and have sent the clear message that architects of genocide will be held responsible for their crimes. While the work to date has greatly contributed to humanity, the long-term legacy of

the Tribunals will be crafted over the next few years. In order to be deemed a success, they must have a successful conclusion. And, in order to fulfill the spirit of the Security Council, they must begin to aggressively focus on the end-game.

### **Foundational Principles of the Ad Hoc Tribunals**

In establishing the Tribunals in UNSC Resolutions 827 and 955, the Security Council noted its determination that they were a necessary response to ongoing threats to international peace and security. The Tribunals' jurisdiction is specifically and repeatedly limited to "serious" and "grave" violations of international humanitarian law. The tribunals were not established to judge each and every violation of law that occurred during the conflicts. And the tribunals were not designed to completely usurp the authority of sovereign states.

The Security Council clearly envisioned the fundamental responsibility of domestic courts for adjudicating some of these serious violations. The statutes specify that domestic courts have concurrent jurisdiction with the Tribunals for the "serious" violations that the Tribunals are empowered to prosecute. UN Security Council Res. 955 calls for strengthening domestic judicial systems in Rwanda, "in particular to the necessity for those courts to deal with large numbers of suspects." It is clear that the intention of the Security Council was for the tribunals to prosecute the leadership of the organizations that committed the atrocities leaving the balance to the states.

The Tribunals should therefore focus on this narrow group of perpetrators as originally envisioned and conclude their work by 2007, a date suggested by President Jorda. A hundred or more indictments may not be helpful and may undermine the pursuit of justice that may be better left to the regional states. We should encourage ICTY to establish clear guidelines with regional states relating to determining which cases will be pursued by ICTY and which cases should be pursued in domestic courts. We should also urge the ICTR to remain narrow in focus and to encourage local action.

### **State's Responsibility**

For this to be successful, regional states must pick up the balance and not abdicate their responsibility. The abuses cannot go unpunished, and we cannot pretend that they did not occur. In order to bring the tribunals to a successful conclusion, cooperation by the states in the regions is essential. In regards to the ICTY, the Federal Republic of Yugoslavia must fulfill its obligations and transfer all at large indictees to the Hague.

And for our part, I state to you and put others on clear notice: we are committed to bringing Radovan Karadzic and Ratko Mladic into custody using all possible means. Their trials will be a defining moment in the life of the ICTY and a landmark for history.

### **ICTR: U.S. Policy – Endgame**

We will continue to actively support the International Criminal Tribunal for Rwanda (ICTR). We are increasing assistance, utilizing diplomacy, information collection and the existing Department of State rewards program, in locating and apprehending the remaining persons

indicted for war crimes, including those who have killed, attacked, and threatened American tourists. We urge other member states to assist the government of Rwanda in all possible ways, including by providing (or advocating that the UN provide) adequate resources. We are pressing states with indicted persons in their territory to turn those individuals over to the Tribunal for trial.

We also encourage the ICTR to establish clear guidelines with the Government of Rwanda relating to which cases will be pursued by the ICTR and which cases should be pursued in Rwandan domestic court, stressing that the Rwandan government should continue to pursue justice against mid and lower ranking individuals through domestic processes, including gacaca. We continue to take an interest in efforts to improve the management of the ICTR. We support the addition of *ad litem* judges to the ICTR to help accelerate the pace of trials, provided that the management of the ICTR is done in such a manner as to ensure the efficient employment of the *ad litem* judges.

### **Hybrid approaches**

In other areas of the world, such as Sierra Leone and Cambodia, we are working with the international community to tailor an approach to justice that is specific to each country. Here through a hybrid approach it is possible to more closely achieve our ultimate goal of every state fulfilling its responsibility to humankind to guard vigilantly against those who would commit war crimes and to hold perpetrators accountable.

#### **Sierra Leone**

In Sierra Leone, the United States has worked diligently along with the international community to facilitate the establishment of a special court to hold accountable those who bear the greatest responsibility for the atrocities. This treaty-based court, with the significant involvement of the Sierra Leone Government as well as the international community, offers the promise of achieving credible justice in a context that will help build the future of the nation by fully respecting its sovereignty and rebuilding its legal structure. The United States supports the establishment of the Special Court, believing that it is one of several essential components necessary to restoring peace and stability to Sierra Leone and the region.

#### **Cambodia**

Similarly in Cambodia, the United States is a strong supporter of efforts to bring to justice leaders of the Khmer Rouge who bear most responsibility for atrocities committed between 1975 and 1979. It is important that there be accountability in Cambodia in order to promote the rule of law and develop democracy. We have been encouraging both the Royal Government of Cambodia and the United Nations to be flexible in their approaches and to expeditiously finalize an agreement to ensure credible justice is achieved in the establishment of the Extraordinary Chambers. We are urging a prompt resolution of the issues that divide the Cambodian Government and the United Nations so that the long overdue process of justice and accountability can unfold. We look forward to the UN traveling to Phnom Penh soon to negotiate in good faith this final stage in the process.

## **Afghanistan**

Allow me now to address one of the challenges I recognized in my opening comments, and that is Afghanistan. To date, all captured Taliban are in the hands of other Afghan groups. We expect and have repeatedly made clear to opponents of the Taliban that captured fighters must not be harmed and must be treated humanely while they are being held. Afghan leaders, like Hamid Karzai, have said that the Taliban leadership will face justice for any crimes they have committed against the Afghan people. We will also be discussing these individuals with Afghans and the Interim Authority. The international community should stand prepared to assist where needed.

## **President Bush's War Crimes Tribunal Option**

In conclusion, I want to address an issue that has generated much international media attention and legal commentary, and that is the Military Order that President Bush promulgated on November 13. Shortly after September 11<sup>th</sup> the President stated that he would use every tool at the disposal of the United States to combat terrorism and to bring the perpetrators of the atrocities to justice. We are using every military, diplomatic, economic, and legal tool. In creating the war crimes commissions, the president is fulfilling his pledge to the American people by creating another legal option to be used in appropriate cases. It is another arrow in the quiver.

The power to create this commission is within his constitutional authority as commander in chief and is not new. War crimes commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. They were used by General Winfield Scott during his operations in Mexico, in the Civil War by President Lincoln, and in 1942 by President Roosevelt.

One of the fundamental reasons the president invoked the military commission option is because he concluded that we are in a state of armed conflict and war crimes commissions are empowered to try violations. It is clear that the attacks against the United States were more than isolated and sporadic acts of violence, or other acts of a similar nature. Rather, a foreign, private terrorist network issued a declaration of war against the United States. It has organized, trained, and repeatedly carried out cowardly, indiscriminate attacks, including the largest attack in history against the territory of the United States.

An objective review of the horrid history of the organization confirms the state of armed conflict. It begins with a decade's worth of hostile statements by Bin Laden stating that he is at war against the United States. It includes instructions to his followers to kill each and every American civilian. It is built on the finding that al Qaida is responsible for the bombing the World Trade Center in 1993 and accused of attacking U.S. military service personnel serving in Somalia in the same year. Additionally, Bin Laden and al Qaida are indicted for attacking and bombing our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and are accused of perpetrating last year's bombing of the U.S.S. Cole. And of course, it culminates with the horrifying and unprovoked air assaults on the twin towers in New York, the Pentagon, and the airplane tragedy in Pennsylvania. The conduct of al Qaida cannot and should not be considered ordinary domestic crimes, and the perpetrators cannot be deemed to be common criminals. Our

view that this is a state of armed conflict is further confirmed by the international reaction to the events.

NATO's North Atlantic Council declared that the attack was directed from abroad and "regarded as an action covered by Article V of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all." The Organization of American States, Australia and New Zealand likewise activated provisions in mutual defense treaties. UN Security Council resolutions recognized our inherent right to exercise self-defense and that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century."

Our Congress responded equally by passing a joint resolution authorizing "the use of all necessary and appropriate force" in order to prevent any future acts of international terrorism. My friends, this is a war, an unconventional war conducted by an evil aggressor. An aggressor that has no legal right to wage war. Under long established legal principles, the right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization and the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. If they do so they are unlawful combatants.

In this case, the members of al Qaida do not meet the criteria to be lawful combatants under the law of war. They have no right to engage in armed conflict. And because of their intentional targeting and killing of civilians in a time of international armed conflict they have committed war crimes. War crimes commissions are therefore available for adjudicating their specific violations of the laws of war.

As many here know, war crimes tribunals are also an internationally accepted practice with deep historical roots. The international community has utilized war crimes commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The courts which tried most of the leading perpetrators of Nazi and Japanese war crimes were military commissions. These commissions were followed by thousands of Allied prosecutions of the lower-level perpetrators under the Control Council Law No. 10.

By the end of 1958, the Western Allies had used war crimes tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before war crimes tribunals convened by U.S., Australian, British, Chinese, Dutch, and French forces for their atrocities committed during the war. We also convened military commissions in Guam, Italy, Austria, and China.

Today, the commissions as envisioned by the President's Order, while different from those found in our civilian courts, conform with these historical precedents. They are also consistent with the process followed in the current ad hoc tribunals. Like its predecessors in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the commissioners may sit as both triers of law and of fact. As with these prior institutions, decisions such as judicial orders, judgments, and sentences will be reached by a majority vote and not unanimity, and evidence of a probative value will be admitted. And as with the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, portions of the proceedings are authorized to be closed.

In this campaign against terrorism, it is important that the President have the full range of available forums for seeking criminal accountability against persons for their individual and command responsibility for violations of the law of war. The war crimes commission provides a traditionally available mechanism to address these unconventional crimes.

I have been asked why we do not try all the perpetrators in federal courts? Federal courts have not been excluded, rather, a war crimes commission has been included. Should we be in a position to prosecute Bin Laden, his top henchmen, and other members of al Qaida, the option of a war crimes commission should be available to protect our civilian justice system against this organization of terror. A specialized court, as is now international practice for the prosecution of war crimes, will not only bring in the expertise in regards to the law of war but also provide shelter – from persons who have proven that they are willing to kill thousands of people at a time – to the jurors, bailiffs, court reporters, and other personnel who did not sign up for this type of service to be potential victims of terror.

I again thank the many distinguished representatives of the international community who are here today for the outpouring of support shown by you, your governments and your fellow citizens for the September 11th atrocities. We are truly grateful. I look forward to discussing further how we can work together to end impunity and ensure accountability for perpetrators of war crimes. Every country, every capital, every village must fulfill its responsibility to humankind to guard vigilantly against those who would annihilate liberty and innocent life and bring to justice those who so conspire.